per annum and that the 1st respondent do repay to the estate all moneys taken in excess of the testamentary remuneration. There will also be an order that the respondents are empowered to retain the services of Verapaan Chettiar at his present emoluments.

Costs of both parties on a solicitor and client basis to be taxed and paid from the estate of the testator.

Order accordingly.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Arulanandom & Co.*

SENG HIN v. ARATHOON SONS LTD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Winslow J.) July 9, 1968]

[Singapore — Federal Court Civil Appeal No. Y58 of 1967]

Sale of Goods — Merchantable quality — Proof of — Sale of Goods Act, 1893, s. 14(1) & (2).

This was an appeal against the decision of the High Court which had awarded the plaintiffs the sum of $2,369.90 as damages for breach of contract in respect of the sale by the defendants to the plaintiffs of tapioca flour. On appeal it was argued that the plaintiffs had not, on the facts discharged the onus of proving that the goods were of unmerchantable quality. The evidence showed that a portion of the flour had been discoloured. The sacks in which the tapioca was kept had been painted with Chinese letters in red ink and this red ink had penetrated the jute cover with the result that some of the tapioca flour was discoloured. As a result the flour (which was to be delivered to a German firm) was declared under the German regulations to be unfit for human consumption. There was no evidence that the part of the flour which was said to be contaminated by the red colour was insanitary or contained any deleterious ingredient.

Held, allowing the appeal: (1) in order to show that the goods were not of a merchantable quality it had to be shown that the goods were of no use for any purpose for which such goods would normally be used and were therefore not saleable under that description;

(2) in this case the plaintiffs had failed to show that the tapioca flour was of unmerchantable quality under English law, as although the flour may not have been in perfect condition it was on the evidence at least unsaleable as starch; nor had it been satisfactorily found that it was unfit for human consumption under the law of Singapore;

(3) the learned trial judge had erred in law in deciding that the tapioca flour was not of a merchantable quality.

Cases referred to:—

(1) *Cammell Laird & Co.* v. *The Manganese Bronze And Brass Co.* [1934] A.C. 402 at p. 430.

(2) *Bradley & Sons Ltd.* v. *Colonial Continental Trading Ltd.* [1964] 2 Lloyd's Rep. 52 at p. 62.

(3) *Bartlett* v. *Sidney Marcus Ltd.* [1965] 1 W.L.R. 1013 at p. 1016.

FEDERAL COURT.

David Marshall (*K. C. Chan* with him) for the appellants.

J. F. McWilliam for the respondents.

Cur. Adv. Vult.

Winslow J. (delivering judgment of the court): At the conclusion of the hearing we allowed the appeal by the defendants against the judgment of Ambrose J. awarding the plaintiffs the sum of $2,369.90 as damages for breach of contract in respect of the sale by the defendants to the plaintiffs of 10 tons of "Gold Medal" tapioca flour. We now give our reasons.

By Contract No. 2971 dated 6th February, 1963 the defendants sold the aforesaid tapioca flour under its trade name to the plaintiffs at $16.25 per picul ex store packed in bags for shipment in February. The defendants did not know to which part of the globe the goods were to be shipped or for what purpose the said flour was required.

The plaintiffs took delivery of and shipped the bags in question on 16th February, 1963 for discharge at Rotterdam for account of Messrs. Jan Bosscher of Harengroningen. Prior to delivery, the defendants had marked these bags on both sides with their own distinguishing mark consisting of Chinese lettering in red ink using a red dye on stencil on the outer cover of the jute bags as had been their usual practice in the course of their tapioca flour business during the preceding 17 years. It should also be noted that during the preceding 8 years the plaintiffs had purchased the same brand of tapioca flour from the defendant on 5 occasions and sold it to Messrs. Jan Bosscher without complaint.

After arrival of the flour in Holland a survey was conducted on 29th April, 1963 by one, Helmut Tillery, a sworn surveyor from Bremen. He was examined upon oath before the Municipal Court of Bremen in West Germany in early 1967, pursuant to a letter of request, and his deposition was to the following effect. He inspected the outward condition of 50 out of 100 sacks of the tapioca flour concerned and saw the Chinese letters placed by the defendants in red painting on both sides, the painting being put on thicker on one side. He opened about 10 to 15 sacks and found that the red colour had penetrated the jute cover and that granules of the colour were lying on the tapioca flour. Besides, the flour was slightly discoloured. In such cases, the coloured particles were only to be found within the reach of the Chinese lettering and that was where the flour was discoloured. From 3 to 5 sacks he took samples and pieces of the sacking with the red colour on it which he sent for analysis to Dr. Werner Hofmann, of Bremen, a certified food chemist and bacteriologist as well as a qualified analytical chemist. According to

the latter's deposition, only 3 kinds of red colours for the colouring of food and 2 other kinds of red colours for the dyeing of packing material are admissible under regulations enacted pursuant to the Foodstuffs Law applying in the Federal Republic of Germany. From his analysis, he ascertained that the red colour from the samples submitted to him was not one of the admissible red colours under the German regulations and he concluded that the tapioca flour concerned was, under the German regulations, unfit for consumption. It should be noted that both these witnesses in their certificates stated that the "goods contaminated by the said red are unfit for consumption" and that, as we have already pointed out, it was only the tapioca flour within the reach of the Chinese lettering on the jute bags themselves which was slightly discoloured or contaminated. It should also be observed that there is no evidence at all that even that part of the flour which was said to be contaminated by the red colour was insanitary or contained any deleterious ingredient.

For the purposes of this appeal, it will be sufficient for us to deal with the third and fourth grounds of appeal which allege that the trial judge erred in fact and in law in holding that the said flour was of unmerchantable quality because it was not saleable as tapioca flour for the normal uses of tapioca flour, namely, food for human consumption and starch, and as to his finding, in the absence of any evidence, that the said flour was unsaleable as starch.

In our judgment, the trial judge erred in finding that the flour was unfit for human consumption anywhere in the world purely because the German regulations prohibited the introduction of colours other than those approved there for the colouring of food or packing material.

Secondly, the trial judge does not appear to have paid any more than scant attention to the fact that the red colour objected to under German law was only lying on top of the flour within reach of the red lettering on the bags. There is not the slightest evidence as to discoloration of the rest of the flour in these bags.

Thirdly, there is no evidence that the flour could not have been sold as starch.

The question of law for determination on the facts is, accordingly, whether the defendants/appellants are right in their contention that the onus of proving that the goods were of unmerchantable quality has not been discharged by the plaintiffs/respondents.

On this question of law, the first matter to be considered is the meaning of the expression "merchantable quality" in relation to this particular sale. It should be borne in mind that this was a sale of goods by description under their trade name to which the proviso to section 14(1) applies, *viz.*, that in such a sale there is no implied condition as to their fitness for any particular purpose. We mention this proviso in order to draw attention to the fact that the fitness of goods for any particular purpose does not arise in the present appeal and cannot therefore form the basis of any complaint that the goods were therefore of unmerchantable quality.

The question whether goods are of merchantable quality within the meaning of the expression as used in section 14(2) of the Sale of Goods Act, 1893 is to be determined under English law.

As Lord Wright said in the House of Lords in the case of *Cammell Laird & Co.* v. *The Manganese Bronze And Brass Co.*[1]:—

> "What sub-section (2) now means by 'merchantable quality' is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description".

Although Willmer L.J. in the Court of Appeal in *Bradley & Sons, Ltd.* v. *Colonial Continental Trading, Ltd.*[2] appreciated that Lord Wright's *dictum* was clearly obiter and not binding on him he went on to say:—

> "It remains to say that that *dictum* of Lord Wright has recently been followed and applied by Mr. Justice Diplock (as he then was) in *Mash & Murrell, Ltd.* v. *Joseph I. Emanuel Ltd.*, [1961] 1 Lloyd's Rep. 46; [1961] 1 W.L.R. 862. We, of course, are not bound by Mr. Justice Diplock's decision or by the *dictum* of Lord Wright, which was clearly obiter; but as far as I am concerned I see no reason for not accepting the interpretation of the words given by Lord Wright in the passage to which I have referred".

More recently, Lord Denning M.R. in *Bartlett* v. *Sidney Marcus Ltd.*[3] said:—

> "I take the tests as to merchantability stated by Lord Wright in *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co. Ltd.* and *Grant* v. *Australian Knitting Mills Ltd.* In the *Cammell Laird case*, Lord Wright said the goods were unmerchantable if they were "of no use" for any purpose for which such goods would normally be used. In the *Grant case* he said that merchantable meant that the article, if only meant for one particular use in the ordinary course, is 'fit for that use.' It seems to me that those two tests do not cover the whole ground. There is a considerable territory where on the one hand you cannot say that the article is 'of no use' at all, and on the other hand cannot say that it is entirely 'fit for use.' The article may be of some use though not entirely efficient use for the purpose. It may not be in perfect condition but yet it is in a usable condition. It is then, I think, merchantable."

In the present appeal it was contended that the trial judge, by deciding that the tapioca flour was not of a merchantable quality, erred in law and in fact in that he failed to appreciate that the tapioca flour was condemned as unfit for human consumption and prohibited for sale, accordingly, purely under German law and that there was nothing to show in the evidence that it was unmerchantable under English law. It was also contended that no evidence had been adduced to show that the tapioca flour could not have been used or sold as starch.

On the evidence, the trial judge found that the purposes for which the tapioca flour supplied under the contract of sale would normally be used are food for human consumption and starch. He then went on to say:—

"It seems to me that no one would buy the tapioca flour supplied under the contract of sale for the two purposes for which the tapioca flour would normally be used, if he knew that it was discoloured by the red ink. In my judgment, the tapioca flour in the form it was tendered by the defendants to the plaintiffs was not of merchantable quality, because it was not saleable as tapioca flour for the normal uses of tapioca flour, namely, food for human consumption and starch. I am satisfied on the evidence before me that the red colouring came from the red ink used by the defendants to mark the bags with their mark which included Chinese letters, and that the red ink was laid on thickly on one side of the bags when the marking was done".

In our view the appellants' contention is well-founded. The only evidence before the trial judge that the flour was of no use for either of the purposes found by him, and hence unsaleable, was the evidence of the two experts from Germany and he appears to have arrived at his conclusion solely because the tapioca flour had been condemned for human consumption in Germany as a result of the inadmissible red colour used to mark the bags which had discoloured part of the flour. This colour was only inadmissible because of the German regulations and there is no evidence as to its inadmissibility under English law. The trial judge also appears to have overlooked the fact that the discoloration only affected a very small portion of the flour within reach of the lettering on the bags. There is no evidence at all as to the unfitness of the greater portion of the flour whether under German or English law. He also appears to have overlooked the fact that Dr. Hofmann's certificate only condemned as unfit for human consumption that portion of the flour actually contaminated by the inadmissible red colour. There is also nothing in the evidence of these experts to show that the tapioca flour was unfit for use or sale as starch. The trial judge's finding therefore that it could not be used or sold as starch is unsupported by any evidence.

In our judgment the plaintiffs/respondents have failed to show that the tapioca flour was of unmerchantable quality under English law. Undoubtedly, there was discoloration of a small portion of the flour but it must be borne in mind, as the trial judge himself found, that even the contaminated part did not contain any injurious ingredient. The flour may not have been in perfect condition but in our judgment, in the absence of evidence to the contrary, it was at least usable as starch. The sworn surveyor, Helmut Tillery, himself stated that the parcel of goods surveyed by him was tapioca starch and we can think of no reason why it could not have been used or sold as such. Moreover, it has not been satisfactorily proved that it was unfit for human consumption under our law.

It is for these reasons that the appeal was allowed.

Appeal allowed.

Solicitors: *Braddell Bros.; Donaldson & Burkinshaw.*

SAW CHIANG GUAN & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Winslow J.) July 9, 1968]
[Singapore — Magistrate's Appeal No. 230 of 1967]

Criminal Law and Procedure — Joint trial — Persons conducting bookmaking activities in same premises — Whether concerned in commission of same offence — Betting Ordinance, 1960, s. 5(3) — Criminal Procedure Code (Cap. 132), s. 169.

The appellants in this case were jointly tried on a charge under section 5(3)(a) of the Betting Ordinance, 1960. The appellants were found carrying on their bookmaking activities in the same premises, but there was no evidence to show that they were jointly concerned in conducting the bookmaking operations.

Held, allowing the appeal: the joint trial of the three appellants was illegal and therefore their convictions must be set aside.

Case referred to:—

(1) *Teo Kow Chye & Anor.* v. *Public Prosecutor* [1965] 2 M.L.J. 212.

MAGISTRATE'S CRIMINAL APPEAL.

Jimmy Loh for the appellants.

Tay Soo Tee (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Winslow J.: Each one of the three appellants was originally charged separately with acting as a bookmaker on 7th August, 1966 at about 1735 hours in room 407, 4th floor, No. 6 Cecil Street, Singapore and thereby committing an offence punishable under section 5(3)(a) of the Betting Ordinance, 1960 (No. 30/60) but, on 21st October, 1966, the prosecution applied for a joint trial under section 169 of the Criminal Procedure Code. This application was granted and the case eventually came on for hearing at a joint trial of all three appellants on 16th October, 1967 when they were each convicted and fined $3,000, in default 18 months' imprisonment.

Taking the view which I do about their joint trial, it is unnecessary for me to deal with the remaining grounds of appeal which are directed towards the merits.

Section 169 of the Criminal Procedure Code empowers the joint trial of more persons than one where, *inter alia,* they are accused of the